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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91169698
Party	Defendant Discovery Communications, Inc. Discovery Communications, Inc. One Discovery Place Silver Spring, MD 20910
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Attachments	MILITARYCHANNEL_MOTION.pdf (7 pages)(202491 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LOU REDA PRODUCTIONS, INC.,	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91169698
	:	
DISCOVERY COMMUNICATIONS, INC.,	:	
	:	
Applicant	:	

APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Discovery Communications, Inc. ("Applicant") hereby moves to dismiss the Notice of Opposition filed by Lou Reda Productions, Inc. ("Opposer"), pursuant to Fed. R. Civ. P. 12(c), TBMP § 504.01.

Applicant also requests that this proceeding be suspended pending resolution of this motion, that the Discovery Period be extended for thirty (30) days after the Board issues its decision, and that the Testimony Periods be reset accordingly.

Respectfully Submitted,

DISCOVERY COMMUNICATIONS, INC.

By: _____

Anthony Lupo
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(202) 857-6000

Attorneys for Applicant

June 1, 2006

TECH/421753.1

CERTIFICATE OF SERVICE

It is hereby certified that the attached Motion For Judgment on the Pleadings (re Opp. No. 91169698) was sent to Counsel for Opposer: Sanford J. Piltch, Esq., 1132 Hamilton Street, Suite 201, Allentown, PA 18104, via US Mail first class postage prepaid, this 1st day of June, 2006.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LOU REDA PRODUCTIONS, INC.,	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91169698
	:	
DISCOVERY COMMUNICATIONS, INC.,	:	
	:	
Applicant	:	

MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Discovery Communications, Inc. ("Applicant") hereby submits this Memorandum in Support of Applicant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), TBMP § 504.01 (the "Motion").

Opposer Lou Reda Productions, Inc. ("Opposer") filed a Notice of Opposition to application Serial No. 76/977380, in the name of Applicant for the mark MILITARY CHANNEL in Classes 38 and 41, on the grounds that there is a likelihood of confusion with Opposer's alleged mark MILITARY CHANNEL under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

Applicant now moves for judgment on the pleadings because, even if all facts in the Opposition Notice are accepted as true, Opposer's claims can not be successful as a matter of law since Opposer failed to allege that or establish priority, as required for a likelihood of confusion claim.

A Motion for Judgment on the Pleadings is appropriate if all well pleaded factual allegations are accepted as true and no genuine issue of material fact exists, and the moving party

is entitled to judgment as a matter of law. A Motion for Judgment on the Pleadings is appropriately filed after pleadings are closed, but prior to opening of first testimony period.[1]

Applicant also has moved that this proceeding be suspended pending resolution of this motion, that the Discovery Period be extended for thirty (30) days after the Board issues its decision, and that the Testimony Periods be reset accordingly.

I. ARGUMENT

A. Judgment Should Be Granted On The Pleadings Because Opposer Failed To Allege Priority And Opposer's Pleading Is Therefore Insufficient As A Matter Of Law.

Opposer has failed to allege priority regarding rights in the mark MILITARY CHANNEL. In order to prevail in a likelihood of confusion claim pursuant to Section 2(d), a plaintiff must establish, among other things, prior trademark rights in his own purported mark. 15 U.S.C. § 1052(d); *Towers v. Advent Software Inc.*, 17 U.S.P.Q. 2d 1471 (TTAB 1989). As discussed more fully below, Opposer has failed to plead or demonstrate any prior ownership rights in the mark, or any use of the mark prior to the effective filing date of Applicant's application. Opposer has failed to plead or establish priority, and therefore, Opposer's claims must be dismissed as a matter of law.

1. Applicant Has Chronological Priority

It is undisputed that Applicant filed its application Serial No. 76/977380, for the mark MILITARY CHANNEL on June 12, 2003. It also is undisputed that since that time, Opposer has filed two (2) applications for the mark THE MILITARY CHANNEL: the first, Serial No. 76/566395, was filed on December 22, 2003, more than six (6) months after Applicant's

1 In the matter at hand, the first Testimony Period is scheduled to open on November 27, 2006, as per the Board's Order dated March 12, 2006.

effective filing date, and the second, Serial No. 76/639473, filed on May 25, 2005.[2] Opposer alleges a first use date of October 15, 2004, with respect to the mark at issue. Notice of Opposition, ¶ 6. Opposer does not allege that it filed or used the mark at issue prior to Applicant's effective filing date of June 12, 2003.

It is a basic notion of trademark law under 15 U.S.C. §1057(c) that filing any application for registration on the Principal Register, including an intent-to-use application, constitutes constructive use of the mark. Filing first affords the applicant nationwide priority over others, except: (1) parties who used the mark before the applicant's filing date; (2) parties who filed in the USPTO before the applicant; or (3) parties who are entitled to an earlier priority filing date based on the filing of a foreign application under 15 U.S.C. §1126(d) or §1141(g). TMEP §201.02. Opposer fails to meet any of these three (3) categories of exceptions. Thus, by virtue of the fact that Applicant was the first party to file an application for the mark MILITARY CHANNEL, Applicant is the constructive prior user and has priority. Opposer failed to plead priority in its Notice of Opposition, and Opposer failed to demonstrate that it used its mark prior to Applicant's own effective filing date. Because Applicant's mark has chronological priority over Opposer, Opposer's claims should be dismissed.

2. Because There Is No Genuine Issue Of Material Fact And Opposer Has Failed To Establish Priority As A Matter Of Law, Applicant Is Entitled To Judgment On The Pleadings

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2 We note that Opposer states in its Notice of Opposition at ¶ 3 that the filing date of its first application for registration of the MILITARY CHANNEL mark is June 1, 2004; however, according to the PTO web site records, the effective filing date of Opposer's first application, Serial No. 76566395, is December 22, 2003. Regardless, Opposer's application was filed ***after*** Applicant's effective filing date and therefore Opposer can not establish priority.

Rule12(c) and Rule 56(c) of the Federal Rules of Civil Procedure[3] provide for entry of judgment on the pleadings when there "is no genuine issue as to any material fact," and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Conroy v. Reebok Int'l, Ltd.*, 14 F. 3d 1570 (Fed. Cir. 1984); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986) (material facts are "those that might affect the outcome of the suit under governing law"). In this case, if we accept as true all pleaded facts in Opposer's Notice of Opposition, Opposer's claims must fail because Opposer failed to plead priority and failed to demonstrate priority. Accordingly, Applicant is entitled to judgment on the pleadings.

II. CONCLUSION

For the foregoing reasons, Applicant's Motion for Judgment on the Pleadings should be granted and judgment should be entered against Opposer. In addition, pursuant to Rule 2.127(d), 37 C.F.R. § 2.127(d), this proceeding should be suspended pending a decision on this Motion. Further, Applicant requests that the Discovery Period be extended for thirty (30) days after the Board issues its decision and that the Testimony Periods be reset accordingly.

DISCOVERY COMMUNICATIONS, INC.

By: _____

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Attorneys for Applicant

June 1, 2006

3 Rule 12(c) provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(c).

CERTIFICATE OF SERVICE

It is hereby certified that the attached Memorandum In Support Of Applicant's Motion For Judgment on the Pleadings (re Opp. No. 91169698) was sent to Counsel for Opposer: Sanford J. Piltch, Esq., 1132 Hamilton Street, Suite 201, Allentown, PA 18104, via US Mail first class postage prepaid, this 1st day of June, 2006.